**United States Department of Labor**
Office of Administrative Law Judges
800 K Street, NW, Suite 400 N

Washington, DC 20001-8002

Date Issued: December 3, 1997
Case No. 97-ERA-46

In the Matter of

GREGORY LaTORRE
Complainant

V.

CORIELL INSTITUTE FOR MEDICAL RESEARCH
Respondent

Christina M. Valente, Esquire
For Complainant

John T. Kelley, Esquire
For Respondent

BEFORE: STUART A. LEVIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises pursuant to the Energy Reorganization Act of 1974, as amended, 42 USC §5851, ("ERA" or "Act") and the regulations promulgated and published at 29 CFR Part 24 to implement the Act. On April 18, 1997, Gregory



LaTorre ("Complainant") filed a complaint with the Department of Labor alleging that he was the target of a discriminatory personnel action when he was fired by Coriell Institute

for Medical Research (Employer) where Complainant was working as a Laboratory Technician III.

Following an investigation, the New York Regional Administrator, Occupational Safety and Health Administration, U.S. Department of Labor, determined on May 21, 1997, that discrimination in violation of the Act was a factor in the decision to terminate LaTorre's employment. On May 28, 1997, Employer requested a formal hearing, which convened at Philadelphia, Pennsylvania on July 22, 1997.

At the hearing, the parties were afforded a full opportunity to present evidence and argument.[1] The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing, and upon an analysis of the entire record in light of the arguments presented, the regulations, statutory provisions, and applicable case law.

## Findings of Fact

1. Coriell Institute of Camden, New Jersey, conducts scientific research and educational programs in selected areas of medical research, and freezes, stores, characterizes, and distributes cells and DNA to research scientists. (DX 3). Its operations involve the use of radioactive isotopes and it is a licensee of the Nuclear Regulatory Commission (NRC). (Tr. 33).

2. Complainant holds a Bachelor's Degree in science and had worked at Coriell Institute for approximately eight years. (Tr. 18-20). Under the supervision of a researach scientist, LaTorre assisted in establishment of Coriell's DNA respository and worked in the repository identifying the presence or absence of animal and human DNA in special cell samples. (Tr. 19-20).

3. Joseph L. Mintzer is Vice-President and Chief Operating Officer of Coriell. (Tr. 143). Dr. Richard Molivar served as Director of Coriell (Tr. 31) until his death on October 27, 1996. (Tr. 143-44).

4. Dr. Chung Kim was a research scientist in the DNA Repository who served as LaTorre's supervisor until Dr. Kim was terminated by Coriell in July of 1996, (Tr. 22, 145). Dr. Patrick Bender replaced Dr. Kim on August 1, 1996. (Tr. 177). Thereafter, Dr. Bender was LaTorre's supervisor. (Tr. 23).

5. On the morning of Friday, September 13, 1996, LaTorre, Bender, and a third research scientist, Dr. Jay Leonard were working in a laboratory, designated Room 509, at Coriell. LaTorre was at a sink changing the water in a refrigerated water bath when he realized

Dr. Bender had removed the plexiglass screens which shielded stacked Tupperware containers of radioactive phosphorous 32 waste material. Dr. Bender, concerned that the containers might be knocked over, was in the process of moving them. (Tr. 25, 134; 179-180; DX 1).

As Dr. Bender moved the containers, LaTorre turned toward him and told him he was exposing everyone in the room to the radioactivity, and it should be put back behind the shielding. (Tr. 25; 180; DX 1).

6. Dr. Bender acknowledged LaTorre's concern and sought to assure him that the waste was emitting at very low levels. He suggested, however, that LaTorre could leave the room if he was still concerned, and LaTorre did so. (Tr. 25; 180; DX 1). Dr. Bender and Dr. Leonard then proceeded to complete the task of filling the water bath. (DX 1). The record does not show whether Dr. Bender was registered to handle radioactive materials as of September 13, 1996. (Tr. 194).

7. The laboratory in which the incident occurred was cleaned on the afternoon of September 13, 1996 and "conceivably" the cleaning could have changed the radiation readings from pre-cleaning levels. (Tr. 196).

8. Dr. Gary Butler is the Radiation Safety Officer at Coriell. (Tr. 29). On the afternoon of September 13, 1996, LaTorre attempted to contact Dr. Butler to advise him of the exposure incident in Room 509 earlier that day. He first called Dr. Butler's extension, then visited Dr. Butler's laboratory where he spoke with Vicky Kwitowski, one of Dr. Butler's lab technicians. (Tr. 29). LaTorre was advised that Dr. Butler was not at work. LaTorre was unaware and was not advised that Dr. Toji had replaced Dr. Kim as back-up radiation safety officer at Coriell. (Tr. 30, 83).

9. On Monday, September 16, 1996, LaTorre again attempted unsuccessfully to contact Dr. Butler, and then tried to reach Dr. Molivar, Dr. Bender's supervisor. Dr. Molivar, however, was not in the office. (Tr. 31).

On the same day, September 16, 1996, Dr. Bender prepared a letter addressed to Dr. Molivar in which he reported the exposure incident the previous Friday, and also discussed what he described as LaTorre's deep-rooted problems accepting Dr. Bender as his new supervisor. Bender reported to Molivar that he and LaTorre had reached an "impasse" which was "made evident over the last week as the result of two incidents." The two incidents cited involved LaTorre's expressed concern that he was "unduly exposed to radioactivity," and a "confrontation" with Dr. Bender over the exposure incident. Dr. Bender suggested that a third party in "recognized authority" meet with him and LaTorre to resolve their respective roles at Coriell. (DX 1). A copy of the letter was provided to Mintzer. LaTorre had no knoweledge of this letter until May 23, 1997, when it was shown to him by an NRC investigator. (Tr. 85, 110).

10. Mr. Mintzer met with Dr. Molivar and Dr. Bender on Tuesday, September 17, 1996, after he unsuccessfully attempted to locate LaTorre and request his attendance at the meeting. (Tr. 146-47; 186-87). Mintzer, Molivar and Bender proceeded to discuss Dr. Bender's letter and decided to address the supervisory problems Dr. Bender had outlined. Dr. Bender agreed to try again to work and LaTorre, but LaTorre would be required to meet each morning with Bender before 9:00 a.m. to review his assignments "to put some organization in [his] day so that we could increase his job performance." (Tr. 186; 146-47).

11. Mr. Mintzer convened another meeting on the afternoon of September 18, 1996. The meeting was called because Mintzer had heard "rumors" that the NRC was going to visit Coriell, and LaTorre was thought to be the source of the rumor. (Tr. 147).

Earlier in the day, LaTorre had contacted the NRC and reported the radiation exposure incident (Tr. 33). LaTorre could not, however, recall telling any co-workers that he had informed the NRC. (Tr. 34, 37, 88).

12. The meeting called by Mintzer on September 18, 1996, was attended by Mintzer, Latorre, and Bender. (Tr. 35; 148). Mintzer asked LaTorre if he knew anything about the NRC visiting Coriell, and Mintzer recalled LaTorre responding that, "he did not have to disclose that information to me." (Tr. 148). LaTorre recalled Mintzer specifically asking him if he called the NRC and inquiring about the content of his conversation with the NRC. LaTorre acknowledged that he declined to discuss those issues. (Tr. 35).

13. LaTorre's refusal to discuss his NRC conversation at this meeting was based upon his understanding of an NRC notice, designated Form 3, posted in work areas by NRC licensees. The notice stated that safety concerns communicated to the NRC could be treated as private and confidential unless waived by the informant. (Tr. 36).

14. At the September 18 meeting, Mintzer asked, in the context of LaTorre's potential filing of a workers' compensation claim, if LaTorre needed to visit the physician at Coriell's Occupational Safety and Health Office, (Tr. 38; 148). LaTorre indicated he would visit his own physician. (Tr. 38).

Mintzer also advised LaTorre that, in accordance with Coriell's exposure protocol, LaTorre had an obligation to alert his supervisor of any radiation exposure, and if the supervisor was unavailable then he should advise Coriell's Human Resources Office. (Tr. 149). LaTorre indicated he believed he had provided the required notice (Tr. 39; 149), but Mintzer disagreed. Mintzer testified that: "we indicated to him that he had not disclosed it ...."(Tr. 149).

The meeting ended a 11:55 a.m. with Mintzer advising LaTorre that he was to be back from lunch exactly or before 12:55 p.m. LaTorre had never previously been questioned about the time he took for lunch. (Tr. 41).

[Page 5]

15. During the week of September 20, 1996, Mintzer convened another meeting (hereinafter the September 20th meeting) attended by LaTorre, Bender, and Molivar. (Tr. 150; 187). The purpose of the meeting was to discuss Dr. Bender's September 16, letter, LaTorre's complaints, including the NRC complaint and a prior complaint about a biohazard involving DNA extracted from blood, (Tr. 187-189) and to clarify the relationship between LaTorre and Bender. (Tr. 150). Mintzer believed the relationship was "terminal," but Molivar vetoed the idea that LaTorre switch to another position and change supervisors. (Tr. 61).

16. LaTorre testified that during the meeting, Dr. Bender left the room, and Dr. Molivar, in Mintzer's presence, said; "Patrick Bender was wrong for removing the shield, but you were more wrong for calling the agency, the Nuclear Regulatory Commission." (Tr. 49-50). While Dr. Molivar has passed away since this converation took place, Joseph Mintzer was allegedly present and he testified at the hearing. (Tr. 49; 143-159). The record, however, contains no contradiction of LaTorre's account of Dr. Molivar's comment.

17. Before the meeting adjourned, Mintzer and Molivar made it clear to LaTorre that Bender was his supervisor in charge of the laboratories and in charge of his work performance. LaTorre was then given a list of four written instructions identified as "Performance Expectations," (DX 7; Tr. 62, 93; 187, 188) which he was asked to sign. (Tr. 188; DX 7).

18. The "Performance Expectations" included the following:

> --Your supervisor will assign you duties, with a completion date.
> --The completion date is a target date. Every effort should be made to complete the work by that date. In the event that completion of the work is not possible, progress on the work must be reported on or before that date.
> --Every morning at the start of work check with your supervisor to confirm what work is being done that day, whether new assignments are pending, and whether priorities have changed.
> -Requests for personal time (vacation, personal, bereavement, etc.) must be made to and approved by your supervisor. In the event that the supervisor is unavailable, requests are to be made to the Repository Director or the Assistant Director of the Repository according to Institute policy. (DX 7).

19. On November 21, 1996, at 3:00 p.m., LaTorre was fired by Coriell on grounds that he failed to comply with the "Performance Expectations." In pertinent

---

[Page 6]

part, the termination letter specified:

> We must advise you that your employment at Coriell Institute is being terminated effective Thursday, November 21, 1996. Dr. Bender established with you a daily routine that required you to meet with him every day at 9:00 a.m. You have not maintained the schedule and, furthermore, Dr. Bender has reported that you have consistently failed to follow your work schedule by working less than eight hours per day. On Friday, September 13, 1996, you claimed to have been exposed to high levels of radiation, but you did not make a report of the claim to the Human Resources Office in accordance with Coriell Policy, nor did you request to be seen by the doctor at the Occupational and Health Office. Levels of radiation were measured by a technician found to be well below a level which would require special precautions. In addition, your work objectives require that you "do the best job you can for Coriell" and when you do not follow policy or fail to meet the objectives of your position as stated above, you are not meeting this objective. (PX 5).

20. Joseph Mintzer is ultimately responsible for the decision to terminate LaTorre. (Tr. 166). He rendered his decision upon the recommendation of Dr. Bender (Tr. 153) and in consultation with Mrs. Charlotte Tule, Director, Human Resources, and Dr. David Beck, President of Coriell. (Tr 154.) Mintzer acknowledged that he did not, prior to firing LaTorre, independently investigate the grounds upon which Bender's recommendation was predicated. (156-157, 168).

21. Mintzer testified that it was the combination of reasons cited in the termination letter and LaTorre's failure to work in cooperation with his supervisor which justified his dismissal. (Tr. 171).

Failure to Meet Every Day at 9:00 a.m.

22. The termination letter asserted that LaTorre failed to meet with Dr. Bender every day at 9:00 a.m. in accordance with the Performance Expectations issued September 20, 1996. (PX 5; DX 7). Bender kept an anecdotal record of daily meetings LaTorre allegedly missed. (Tr. 191; DX 8). According to this record, LaTorre missed no meeting from September 21 through November 4, 1996. (DX 8). Bender reported that LaTorre failed to check in with him November 4-7, and he reminded LaTorre of his obligation (DX 8), however, he never asked LaTorre why he did not check-in. (Tr. 199). On November 19, Bender noted that LaTorre failed to check-in with him at 9:00 a.m. and on November 20, noted again that LaTorre did not check in, "however there was an all-employee meeting this day". (DX 8).

---



23. Bender testified that between September 13 and November 21, 1996, he was in his office every workday between 8:00 to 8:15 and 9:00 a.m. unless he was in a meeting. (Tr. 197-98). On mornings when he attended meetings, he testified he advised LaTorre that he

could not meet with him, (Tr. 198), however, the anecdotal record does not show the days on which Bender was unavailable to meet with LaTorre, (DX 8).

24. LaTorre testified that he attempted to report to Bender every day by 9:00 a.m., but on some days, if work had begun, he would stop by or call Bender's office after 9:00 a.m. (Tr. 42-43, 93). At times, if Bender was not available to meet at 9:00 a.m., LaTorre would meet with him later in the day, or the next day Dr. Bender was available.(Tr. 43). LaTorre testified that Bender never complained to him that he was not following the daily check-in rules set forth in the Performance Expectations, (Tr. 43), and Dr. Bender never asked LaTorre why he may have missed a meeting. (Tr. 199, 202-03).

Working Less Than Eight Hours Per Day

25. The termination letter alleged that LaTorre consistently worked less than eight hours per day. Like the record of LaTorre's attendance at meetings, the record of his daily attendance is "anecdotal." (Tr. 168; 191-193; DX 8). LaTorre was a salaried employee (Tr. 63) whose hours varied from day-to-day from 9:00 a.m. to 5:00 p.m., 8:00 a.m. to 4:00 p.m.; or 7:00 a.m. to 3:00 p.m. with 1 hour for lunch and a 15 minute break. (Tr. 64). Bender and Mintzer confirmed that LaTorre was entitled to a one hour lunch and a 15 minute break, and was required to work 6 1/2 to 6 3/4 hours per day. (Tr. 158-59; 213-14). LaTorre was not required to sign-in or out or punch a time clock. (Tr. 168; 217).

26. According to Bender's anecdotal record, on the following days, LaTorre worked fewer than the required hours:

| | | |
|---|---|---|
| October 10, 1996 | Arrival: | 9:00 a.m. |
| | Lunch: | 1 hour |
| | Departure | 4:00 p.m. |
| October 16, 1996 | Arrival: | 9:00 a.m. |
| | Lunch: | 1 hour |
| | Departure: | 4:00 p.m. |
| November 7, 1996 | Arrival: | 9:00 a.m. |
| | Lunch: | 1 hour, 15 minutes |
| | Departure: | 4:00 p.m. |
| November 11, 1996 | Arrival: | 8:15 a.m. |
| | Lunch: | not noted |
| | Departure: | 4:00 p.m. |

27. For the two month period, September 20, 1986 through November 21,

1996, Bender recorded that LaTorre may not have followed his work schedule on three days for a total of two hours thirty minutes. In contrast, Bender acknowledged an instance in which LaTorre worked extra time, but he did not record it (Tr. 215).

28. LaTorre worked in seven different laboratories on three different floors (Tr. 42) and Bender did not always work with him. Dr. Bender would not necessarily be aware of LaTorre's work station at any given time or any overtime work he may have performed. (Tr. 218).

29. Bender testified that ordinarily, " we do not keep that close a track of hours." Employees are permitted to take an extra 15 minutes from time to time, and it is only when they are missing "a lot" that they are suspected of abusing the privilege. (Tr. 218-219). Bender did not object when other employees failed to work the required number of hours (Tr. 217), and Bender never questioned or admonished LaTorre about his hours of attendance. (Tr. 220).

30. Mintzer had never before fired a Coriell employee for a work hours abuse (Tr. 171), and he did not ask Bender, in this instance, the degree of LaTorre's alleged abuse. (Tr. 168). Prior to firing LaTorre, Mintzer did not know whether Bender's allegation of abuse involved five minutes or five days.(Tr. 168).

After Required Evidence

31. After he fired LaTorre, Mintzer conducted an investigation of LaTorre's attendance using the building access security system. (Tr. 157-58, 161). Each employee has a specific card which, when used, identifies the employee as he or she enters and leaves the building. (Tr. 159). Using the building access system data, Mintzer estimated that LaTorre on average worked 6 hours per day rather than the required 6 3/4 hours. (Tr. 158-59).

32. The building access system, however, would not always record an employee's presence at work. Thus, two or more employees could pass through the door at one time with one swipe of a card by one employee. (Tr. 159). Employees could also enter and exit through the loading dock, which, although supervised, is not on the pass key system. (Tr. 161). Further, the administrative offices are not part of the laboratories, and security card use is not required to enter or leave the administrative offices during normal business hours from 8:00 a.m. to 4:00 p.m. (Tr. 173-175). Employees regularly have reason to be in the administrative office building during regular working hours. (Tr. 174). For attendance purposes, however, if an employee's workday started or ended in the administration building, the security system would accord him no credit for the time worked in that building, since it would not record the actual arrival time in the morning nor the actual departure time in the evening.

---



Failure to Report Radiation Exposure

33. The termination letter asserted that LaTorre failed to report the September 13, 1996, radiation exposure incident to Coriell's Human Resources Office and did not request to be seen by the doctor at Coriell's Occupational and Health Office. (PX 5).

34. Mintzer thus testified that Coriell's exposure protocol requires the employee to notify his supervisor of an exposure incident, and if the supervisor is not available, notification should be given to the Human Resources office. (Tr. 149). Mintzer believed LaTorre failed to disclose the exposure incident as required by the protocol, and the termination letter cites this failure as a ground for the termination. (Tr. 149; PX 5).

35. The record shows, however, that LaTorre's supervisor was involved in the September 13, 1996 radiation exposure incident, and his supervisor was well aware of LaTorre's concern.

Moreover, Bender wrote a letter to Molivar dated September 16, 1996 which discussed, inter alia, both the incident and the concerns LaTorre expressed to him (DX 1). The record shows that Mintzer not only received a copy of Bender's notification letter, but arranged a meeting on September 17, 1996 to discuss it with Molivar and Bender. (Tr. 146). Nevertheless, Mintzer denied that he was aware of the exposure issue until September 18. (Tr. 164).

36. The record shows that LaTorre complied with the exposure incident notification protocol on September 13, 1996, when he expressed his concern to Dr. Bender, his supervisor that Dr. Bender was exposing him to radiation. (Tr. 149, 172-73). It thereafter became the obligation of the supervisor to advise Mintzer (Tr. 164). Thus, if receiving a copy of Bender's September 16 letter to Molivar did not constitute adequate notice to Mintzer, and if Molivar and Bender did not mention it to Mintzer at their meeting on September 17, the failure was not attributable to LaTorre. (Tr. 146, 164-65).

37. Similarly, LaTorre's failure to request a visit with Coriell's Occupational and Health Office (OHO) physician is cited as a ground for his dismissal. Initially, no Coriell exposure protocol was introduced into the record of this proceeding which requires an exposed employee to request a visit with Coriell's OHO physician. Beyond that, Bender, Molivar, and Mintzer met twice with LaTorre, and none mentioned that such a requirement would be imposed. (Tr. 70). LaTorre recalled that Mintzer suggested he visit OHO if he intended to file a worker's compensation claim, (Tr. 38), but Mintzer did not order him to visit OHO, and did not indicate that it was otherwise required. (Tr. 70, 89-90). Mintzer testified that

---



he asked LaTorre at their September 18 meeting "if he believed that he needed to be seen by employee health," (Tr. 148) and LaTorre indicated he had made an appointment to see his own physician. (Tr. 149). Neither Mintzer nor Bender contradicted LaTorre's

assertion that no one informed him that he was, under any applicable protocol, required to see Coriell's health officer.

Failure to Meet Work Objectives

38. The termination letter asserted as a ground for dismissal that LaTorre failed to meet the work objectives of his position. (PX 5).

1.

39. Dr. Bender testified that he thought it necessary to meet with LaTorre every day to keep track of his work progress and assignments, and "to put some organization into Mr. LaTorre's day so that we could increase his job performance." (Tr. 186). Dr. Bender testified he was not satisfied with LaTorre's job performance either before the Performance Expectations were given to LaTorre on September 20, or thereafter. (Tr. 190, 192). He explained that LaTorre's work was "competent enough, but the amount of work he did was not very much...." (Tr. 190). On cross-examination he acknowledged, however, that LaTorre competently performed the work he was assigned. (Tr. 206).

Dr. Bender was also dissatisfied with LaTorre's "efficiency." (Tr. 206). The record, however, is devoid of any evidence showing that LaTorre failed to meet any deadline for any task assigned by Dr. Bender, or that he was unable or refused to accept or execute any assignment due to a work backlog. Nor does the record show what more work Dr. Bender expected that LaTorre's alleged inefficiency prevented either Dr. Bender or LaTorre from accomplishing.

2.

40. The record contains performance evaluations prepared by Dr. Kim, LaTorre's supervisor in 1994, 1995, and 1996 and reviewed and further evaluated by Dr. Molivar. (DX 2; PX 1, 2). In 1994, Dr. Kim rated LaTorre "outstanding" while Dr. Molivar thought that rating "overstated" LaTorre's performance. Molivar noted an incident in which LaTorre made a disrespectful comment about Dr. Hoover, and downgraded LaTorre's rating to "satisfactory." (DX 2).

41. In 1995, Dr. Kim noted that LaTorre was "very productive," and "always tries to finish his assignments with excellent quality on time." On this occasion, Dr. Molivar agreed with Kim's evaluation, adding: "Greg continues to be a valuable dedicated, industrious employee whose work is of satisfactory quantity

---



and high quality." Dr. Molivar went on to note that even Dr. Hoover, who had been involved in the incident noted in the 1994 evaluation, mentioned to Molivar "how well

Greg has performed" in the area of Monosatellite analyses of Repository DNA samples. (PX 2).

42. In 1996, Dr. Kim again evaluated LaTorre as "very productive," a "dedicated and hard worker," and "diligent." Dr. Molivar again agreed with Dr Kim, adding his own complimentary comments about LaTorre's loyalty, industry, and diligence. (PX 1).

3.

43. In deciding to terminate LaTorre, Mintzer was aware of his performance evaluations. (Tr. 168). He discounted them, however, because he: "knew that Dr. Kim and Mr. LaTorre had a very long relationship together. The previous records indicated by Dr. Molivar that those records that Kim had done were in fact overstated. I did not know to what extent those were overstated. As a result of that I made a decision based upon the information I had directly from Dr. Bender I did not take into account previous records and previous performance appraisals that were done by Dr. Kim." (Tr. 169-70).

44. Mintzer did not explain why he also discounted or ignored Dr. Molivar's evaluations since it was Molivar who first suggested that Kim "overrated" LaTorre in 1994. In subsequent years 1995 and 1996, however, Dr. Molivar not only concurred with Dr. Kim's evaluations, but provided his own complimentary evaluations of LaTorre's diligence and the quality and quantity of his work.

4.

45. On the day Dr. Kim was dismissed in July, 1996, Mintzer met with LaTorre to inform him of Kim's departure. LaTorre testified that Mintzer commented that he knew LaTorre was loyal to Kim, but that he, Mintzer, was (as of July 1996) very happy with LaTorre's performance, and he wanted LaTorre to continue his efforts. (Tr. 79). There is no contradiction of LaTorre's account of this conversation in this record.

NRC Investigation

46. Pursuant to LaTorre's complaint, NRC investigators visited Coriell on September 18, 1996. As a result of their inspection, they found no violations, and so informed Coriell on October 15, 1996. (DX 5). The NRC's letter also identified LaTorre as the only Research Technician its investigators contacted on September 18.

47. On October 16, 1996, the NRC informed LaTorre that it was unable to

---



substantiate his concerns, and noted it was "doubtful" that anyone in the room received a measurable exposure to radiation from the phosphorus-32 when Dr. Bender moved it from its shielding. (DX 4).

48. An NRC policy statement issued on May 14, 1996, indicates that Employee's should normally raise safety concerns with the licensee. (In this case, Coriell), (61 Fed. Reg. At 24340). The NRC letter to LaTorre at numbered paragraph 5 suggests that LaTorre may not have acted in a manner consistent with that policy. It states: "You did not immediately raise concerns to management." (DX 4, p. 2). As previously noted herein at Findings 35 and 36, supra, LaTorre immediately notified his supervisor of his safety concerns and complied with Coriell exposure notification protocols in respect to the September 13, 1996, incident.

49. Dr. Bender testified that LaTorre never advised him of his intention to contact the NRC, and although it had been rumored that LaTorre had contacted the NRC, he became aware of the contact, "when this case came up." (Tr. 183). Bender further testified that, at the time he recommended to Mintzer that LaTorre be terminated in November, 1996, he was not influenced in anyway by the fact that LaTorre had filed an NRC complaint, and "didn't know at the time that he had filed a complaint with the NRC." (Tr. 192).

Upon further examination, however, Dr. Bender acknowledged that he was present at the meeting on September 18 when Mintzer confronted LaTorre with the rumor that the NRC was going to visit Coriell and asked LaTorre if he knew anything about the NRC visit. (Tr. 218, 148). He heard Mintzer ask LaTorre "if he called the NRC," (Tr. 218) and he was present when LaTorre refused to disclose that information, (Tr. 35, 148). Later that day, Bender, Mintzer, and others at Coriell, including its President, David Beck, actually were contacted by the NRC investigators. (DX 5, p.3).

50. I find it reasonable to infer from the foregoing facts that both Mintzer and Dr. Bender had compelling reasons to believe, and probably did believe, as of September 18, 1996, that LaTorre complained to the NRC, and that his complaint prompted the NRC investigation.

51. Mintzer testified that the decision to fire LaTorre was based upon Dr. Bender's recommendation, and was not in any way related to LaTorre's complaint to the NRC. (Tr. 153).

LaTorre's Relationship with Dr. Bender

52. The record shows that apart from LaTorre's NRC complaint, his relationship with Dr. Bender was, from the outset, strained to the extent disagreements arose concerning the handling not only of the phosphorous-32, but biohazardous materials, and

---



research methodologies and procedures. (Tr. 44-45, 47, 80, 95-96, 131-32). Bender viewed these disagreements as an indication that LaTorre not only refused to accept his supervisory authority but considered himself in charge of the organization and operation of all procedures in the laboratories in Rooms 508 and 509. Dr. Bender sensed that

LaTorre resented the dismissal of Dr. Kim and was unable to accept him as his new supervisor. (DX 1). He testified that LaTorre was, at times, disrespectful and critical, and that LaTorre compared him unfavorably with Dr. Kim, his previous supervisor. (Tr. 182).

LaTorre denied that he was resentful or disrespectful of Dr. Bender, but the record contains no specific contradiction that LaTorre adversely compared Dr. Bender with his previous supervisor. (Tr. 79).

53. The record shows that LaTorre was acting under what he described as instructions from Molivar to "indoctrinate" Bender in the workings of Coriell and its operations and procedures. (Tr. 47). Further, the record does not show that Dr. Bender had been advised that LaTorre would be performing that role. Dr. Bender may have, in part, misperceived LaTorre's efforts to "indoctrinate" him as an affront to his authority and responsibility, because he was unaware of Molivar's instruction.

After Dr. Bender complained on September 16 about what he perceived to be LaTorre's confrontational attitute, he noted that LaTorre's "attitude" changed, and they had no confrontations after that. (Tr. 192-93).

54. The termination letter does not cite insubordination or disrespect of a supervisor as a factor or ground in support of the adverse action. (PX 5).

Coriell's Personnel Policies

55. Coriell published an Employee Handbook in August 1996, which it provided "as a matter of reference" to its employees. (DX 3). The Handbook was not intended to affect Coriell's right to terminate an employee for a violation of Coriell policy or failure to carry out responsibilities, but it does disclose policies and principles applicable to "all employees" that include how management should treat employees and vice versa. (DX 3, p. 1-1).

56. In respect to employee discipline, the Handbook states:

> Policies and procedures supported by rules and regulations are essential to the efficient operation of any organization. Supervising others would not be difficult and there would be no need for discipline if people always did exactly what they were supposed to do. Unfortunately, people often do as they please.

---

[Page 14]

> It is the policy of the management of the Institute to be patient, sympathetic, fair, and tolerant in administrating its policies and procedures; however, repetitive, willful, and inexcusable breaches of acceptable employee performance will be dealt with firmly and promptly under a uniform discipline policy applicable to all employees.
> Following is an outline of the procedures management has requested supervisors to use in handling disciplinary situations.

-Administer a reprimand or disciplinary action promptly and in private.
-Allow as little time lag as possible between the offense and the reprimand or discipline.
-Investigate all the facts and evidence before charging an offense.
-Permit the employee to see and hear charges.
-Permit the employee to respond to charges. Permit employee to have personnel representative help him/her.
-Have the penalty fit the offense and be consistent with other disciplinary actions. Use written warning, suspension, or dismissal. For example:
--Dismissal for serious offenses (e.g., stealing, figiting, drugs, weapons, falsification of records, insubordination, etc.)
--Written warning and/or suspension for willful or repetitive infraction of rules.
--Written warnings for less serious offenses,(e.g., tardiness,unexcused absence, faculty work, etc.)
--Permit employee to appeal decision to
--Make written record of offense and discipline and place it in employees personnel file.
--After one year of discipline - free service and a favorable performance review, eliminate the discipline report from the employee's personnel file. (DX 3, p. IX-1).

57. In respect to the dismissal of an Employee, the Handbook states:

A supervisor may recommend to the Executive/Principal Investigator dismissal of an employee for unsatisfactory job performance or misconduct. The supervisor should set forth the recommendation in writing outlining the reasons for dismissal and the efforts made to remedy the shortcomings of the employee to make him/her successful on the job.
The employee should be offered the opportunity to discuss the matter in accordance with the Grievance Policy.
The final decision to dismiss an employee requires the concurrent agreement of the Executive/Principal Investigator, the Personnel Office, and the Chief Operating Officer. (DX 3, p. II-4).

---



58. While it was suggested that the Handbook discipline and dismissal policies do not necessarily apply to paraprofessionals who are "at-will" employees, the Principles of Administration and Operation apply to "all employees" (DX 3, p. I-1), and there is no evidence in this record that the procedures set forth in the Handbook differ from the Principles of Administration and Operation. Nor is there evidence that the general policy of Coriell management, "to be patient, sympathetic, fair, and tolerant in administering its policies and procedures," is inapplicable to "at-will" paraprofessional employees. (DX 3, p. IX-1).

Effects of the Adverse Action

59. As a result of the termination, LaTorre experiences depression, anxiety and believes he has lost some of his identity and self-esteem. (Tr. 71, 115-116).

60. LaTorre has attempted to find employment through classified ads in the Philadelphia Inquirer, job search agencies, and family contacts. (Tr. 72, 80, 108, 115-16). He has sent out approximately 50-75 resumes to potential employers, bought a new suit, and has been invited to four or five interviews. (Tr. 72, 108-09, 111). He has, however, been unsuccessful in securing employment.

LaTorre explained that potential employers usually inquire about the reason he left Coriell Institute, and he believes that his response disclosing that a dispute concerning safety issues led to his termination is adversely affecting his employment opportunities. (Tr. 72-74, 109-111).

61. As a result of the termination and his inability to secure employment, LaTorre has had to draw on his retirement savings to pay his home mortgage and living expenses since his eligibility for unemployment compensation expired. (Tr. 74-75). In addition, he had, as of the date of the hearing, incurred attorney's fees at the rate of $175.00 per hour totalling $3,500.00 in connection with this matter. (Tr. 76).

---

[Page 16]

Discussion

The Energy Reorganization Act of 1974, as amended in 1992 (Energy Policy Act of 1992, P.L. 102-486, §2902(d)) provides, in part, as follows:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 USC 2011 et seq.);
(B) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
(C) testified or is about to testify in any such proceeding or
(D) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended. (42 U.S.C.A. §5851(a)).

Sections (b)(3)(A) and (B) of the Act provide that employee complaints alleging discrimination shall not be investigated and shall be dismissed unless (1) the complainant shows, prima facie that protected activity is a contributing factor in the unfavorable personnel action, and (2) the Employer fails to show, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Employee's protected activity.

Complaints lacking in merit are dismissed by the Occupational Safety and Health Administration, (OSHA) which investigates ERA complaints filed with the Department of Labor. If the threshold allegations have merit, and the Employer fails to show that protected

---



activity was not the reason an adverse personnel action was taken, OSHA then issues a notice of determination to the employer which includes an order to abate the violation. (29 CFR §24.4 (a) and (b)). Dissatisfied complainants or employers may request a formal hearing. 29 CFR §§24.4(d)(2)(i), (d)(3)(i). In this instance, OSHA found against the Employer which then invoked its right to a hearing.

The Act provides a framework for the adjudication of the dispute. Pursuant to Section 5851(b)(3)(C) the Complainant must, to establish a violation of Section 5851(a), demonstrate by a preponderance of the evidence that protected activity was a "contributing factor" in the unfavorable personnel action. See, Dysert v. Secretary of Labor, 105 F.3d 607, 610 (11th Cir. 1997). Relief may not be ordered, however, if the Employer then offers "clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of protected behavior. 42 U.S.C.A. §5851(b)(3)(D); Stone & Webster Engineering Corp. V. Herman, 115 F.3d 1568 (11th Cir. 1997).

Thus, Section 5851 (b)(3)(C), places upon LaTorre the burden of persuasion to demonstrate by a preponderance of the evidence that retaliation for his protected activity was a "contributing factor" in Coriell's decision to discharge him. Upon consideration of the record viewed as a whole, I conclude that LaTorre has satisfied this burden through both direct evidence and circumstantial evidence which raises a reasonable inference that retaliation was more likely than not a factor contributing to his termination.

## Protected Activity

At the outset, Coriell argues that LaTorre's complaint to Dr. Bender, his supervisor on September 13, 1996, that Dr. Bender exposed him to radioactive waste material, and LaTorre's subsequent contact with the NRC regarding the incident, were merely general inquiries regarding safety which do not constitute

protected activity. Coriell cites Bechtel Construction Co. v. Secretary of Labor, 50 F.3d 926, 931 (11th Cir., 1995) in support of its assertion.

While there is dicta in Bechtel which supports the contention that general inquiries regarding safety issues are not protected, Coriell's assertion that Bechtel would exclude LaTorre's communications from protected status is without merit.

In Bechtel, the Secretary concluded that an employee who was "unfamiliar with procedures", and "wondered" to his supervisor about the proper way to handle contaminated tools engaged in protected communications. The Bechtel court agreed, noting that the Employee did not merely make general inquiries about safety procedures, "he raised particular, repeated concerns about safety procedures for handling contaminated tools." (Id. at 931). LaTorre's concerns were decidedly more direct. Considering

---



the content and context of the concerns expressed by LaTorre regarding the manner in which his supervisor was potentially exposing him to radioactive material, Bechtel, rather than supporting the Employer's contention, could readily be construed as compelling the conclusion that LaTorre's communications to both his supervisor and the NRC constituted protected activity.

LaTorre was not inquiring about general safety procedures with which he was unfamiliar or "wondering" with unfocused curiosity about safety issues. In contrast with the Employee in Bechtel, LaTorre specifically objected to the way his supervisor was handling radioactive material, and he voiced this concern to his supervisor immediately and directly. Several days later he repeated his complaint to the NRC. Considered in context, we are not here dealing with questionable communications which may be merely "tantamount" to a complaint. LaTorre's communications were precise, specific, and clearly within the zones of protected activity encompassed by Sections a(1)(A), (D), and (F) of the Act.

Substantiation of a Safety Complaint

Coriell next contends that LaTorre's concerns are not covered by the protection of the ERA either as an "internal" complaint or as a safety inquiry to the NRC. The Employer acknowledges the precedents which include internal complaints within the Act's coverage, and the 1992 Amendments to the Act which specifically included internal complaints within the framework of protected activity. The Employer argues, however, that the NRC conducted an investigation, was unable to substantiate LaTorre's concerns, and found no violations arising out of the September 13, 1996, incident. Consequently, the Employer reasons that, "the inquiry as to safety would not be protected activity..." (Emp. Brief at 5-6).

It is unnecessary to unduly belabor a discussion of the Employer's rationale in this regard. The policy underlying the ERA and the employee protections it affords are designed to promote and encourage the full unfettered flow of safety-related information and safety concerns not only to employers but the NRC as well. Nothing in the language of the Act conveys any intent to restrict its coverage only to those concerns which address actual violations or imminently hazardous conditions. Accordingly, in deference to the policy objectives of the ERA and similar enactments, the precedents which guide this adjudication have not required the ultimate substantiation of the employee's concerns. Passaic Valley Sewage Comm'rs. v. Dept. Of Labor, 992 F.2d 474 (3rd Cir., 1993); Yellow Freight Sys., Inc. v. Martin, 954 F.2d 353 (6th Cir., 1992); Oliver v. Hydro-Vac Services, Inc., 91 SWD 1 (Sec. 11/1/95); Aurich v. Consolidated Edison Co., 86 ERA 2 (Sec. Order, 4/23/87). It is sufficient that a Complainant have a "reasonable belief" or a "good faith perception," that a potential violation has occurred or might occur or a potentially hazardous situation may exist. Passaic Valley, supra; Minard v. Nerco Delamar Co., 92 SWD 1 (Sec., 1/25/94); Yellow Freight, supra; Oliver, supra; Aurich, supra. Thus, the courts have specifically protected the disclosure of a "possible

---



violation" even when a subsequent NRC investigation revealed the employee was mistaken. Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505 (10th Cir., 1985), cert. denied, 478 U.S. 1011 (1986); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159 (9th Cir., 1984).

The record shows that LaTorre was working at a sink with his back to Dr. Bender, as Dr. Bender removed radioactive phosphorous-32 from behind its plexiglass shield. When LaTorre turned around and saw the phosphorous-32 waste material was no longer shielded, he had reasonable cause to believe not only that a potentially hazardous condition existed, but that a possible violation of safety procedures had occurred. While the NRC determined that Dr. Bender was correct in concluding that the waste was emitting at very low, non-hazardous levels, and while Bender and LaTorre disagreed in respect to whether a hazardous situation existed at the time of the incident, the circumstances do not suggest the LaTorre's perception of a hazard was ill-founded or that his complaint lacked good faith. Indeed, Dr. Bender, at the time, invited LaTorre to leave the room if he was concerned, and LaTorre did so. Nor were LaTorre's apprehensions subsequently dispelled by readings taken in the lab later in the day. The record shows that the laboratory was cleaned on the afternoon of the incident and such clean-up conceivably could have changed the radiation readings.

Under these circumstances, both the complaint to Dr. Bender and the report of a possible violation to the NRC were reasonable and protected, notwithstanding the NRC's ultimate determination that a violation could not be substantiated.

Employee Motivations

Coriell invites an inquiry into LaTorre's motivations for complaining. In its view, LaTorre's NRC complaint not only was deemed without merit, but LaTorre was a disgruntled employee whose complaints targeted his new supervisor, Dr. Bender.

The Employer's argument is misplaced.

While actions of a disgruntled employee, unrelated to protected activities, are relevant in determining the merits of an employer's defense, if an employee has a reasonable belief that a potential hazard exists, his motivation in complaining has no bearing on the status of his complaint as a protected communication. Disgruntled employees may report violations to the NRC, and an intent to retaliate does not alter the nature of the informant's protection. As the Secretary observed in Nathaniel v. Westinghouse Hanford Co., 91 SWD 2 (Sec., 2/1/95), a desire to retaliate does not foreclose independent concern for safety.

Employer's Knowledge of Protected Activity

The Employer contended at the hearing that rumors of LaTorre's call to the

---



NRC were circulating among its workers, but it was unaware of LaTorre's actual NRC contact. Consequently, in Coriell's view, LaTorre's contention that the adverse action was predicated upon the NRC contact cannot be sustained.

Although not addressed in its post-hearing brief, the employer adduced testimony and argument at the hearing that LaTorre failed to notify Coriell management of the incident in violation of Coriell exposure protocols, and then circumvented his chain of command by notifying the NRC. Dr. Bender further testified that at the time he recommended LaTorre's termination, he did not know LaTorre had filed a complaint with the NRC. The record fails to support any of these contentions.

LaTorre's complaint to Dr. Bender, his direct supervisor, on September 13 constituted all of the notice necessary not only to satisfy Coriell's exposure protocols but to invoke the protections of the ERA. Croslier v. Portland General Elec. Co., 91 ERA 2 (1/5/94); Samodurow v. General Physics Corp., 89 ERA 20 (11/16/93); Nichols v. Bechtel Consturction Corp., 87 ERA 44 (10/26/92) app. dismissed, No. 92-5176, (11th Cir., 1992). The contention that LaTorre, thereafter, violated his chain of command by notifying the NRC is devoid of merit. Pogue v. Dept. of Labor, 940 F.2d 1287 (9th Cir., 1991); Carson v. Tyler Pipe Co., 93 WPC 11 (3/24/95); Pillow v. Bechtel Construction Co., Inc., 87 ERA

35 (Sec., 7/19/93), App. Dismissed No. 93-4867; Rainey v. Wayne State Univ., 90 ERA 59 (Sec., 3/21/95) (11th Cir., 1993); Talbert v. Washington Public Power Supply, Inc., 93 ERA 35 (ARB 9/27/96).

The record shows that LaTorre, unlike the employee in Saporito v. Florida Power & Light Co., 89 ERA 7, (Sec. D&O on Recon., 1995), fully advised Dr. Bender of the scope, nature, and substance of his concerns several days before he contacted the NRC. Dr. Bender then reported the incident, in detail, in his letter to his supervisor, Dr. Molivar on September 16, a copy of which was reviewed by Mintzer. LaTorre in no way circumvented Coriell's chain of command when he contacted the NRC.

Moreover, although a question has been raised in respect to whether Coriell management actually knew about LaTorre's contact with the NRC, the evidence is more than sufficient to establish their awareness of his disclosure. By September 18, 1996, Mintzer was aware of rumors circulating at Coriell that the NRC would soon be visiting. Suspicion of complicity in the visit quickly fell upon LaTorre. Mintzer called LaTorre to his office, and in Dr. Bender's presence, asked him directly if he called the NRC. LaTorre, in turn, did not deny he called the NRC. Instead, he declined to answer the question or discuss the substance of his NRC contact. Later that afternoon, the NRC conducted a site visit at Coriell which included an investigation of the September 13th exposure incident in Laboratory 509.

---

[Page 21]

The record shows that Mintzer and Dr. Bender were both aware of the NRC investigation and were contacted by NRC investigators. Mintzer and Dr. Beck attended the NRC's Exit Meeting. If Mintzer and Dr. Bender suspected LaTorre of contacting the NRC before they met with him on September 18th, his refusal to discuss his NRC contact, while not denying it, probably intensified their suspicions. (See, Pillow v. Bechtel, supra, 87 ERA 311 (See, 7/19/93). When the NRC then actually investigated the exposure incident, any lingering doubt was probably dispelled. Finally, on October 15, 1996, Mintzer received confirmation of an NRC contact by LaTorre when the NRC, in its letter to Mintzer, identified LaTorre as the only Research Technician it contacted during its September 18 visit.

Under these circumstances, the notion that Coriell could not have retaliated against LaTorre, because it was unaware of LaTorre's protected activity is devoid of merit. To the contrary, Mintzer and Dr. Bender had compelling reasons to believe, and probably did believe as of September 18, 1996, that LaTorre contacted the NRC and precipitated the NRC investigation.

I therefore conclude that Dr. Bender was aware of LaTorre's protected activities, both internal and external, at the time he recommended that LaTorre be fired, and Mintzer was aware of LaTorre's protected activities, both internal and external, when he accepted Dr. Bender's recommendation and terminated LaTorre on November 21, 1996.

Protected Activity as a Contributing Factor

Although LaTorre has established that he engaged in protected activity, he must yet demonstrate by a preponderance of the evidence that retaliation for his protected activity was a "contributing factor" in the decision to fire him. On this record, he has satisfied his burden through both direct and circumstantial evidence.

The Secretary and the Courts have held that a temporal nexus between the protected activity and the adverse personnel action is sufficient to raise an inference of causation. See, Stone v. Webster, supra; Mandreger v. Detroit Edison Co., 88 ERA 17 (Sec. 3/30/94). The Employer contends, however, that the temporal connection is severed by the intervening two months between the protected activity and LaTorre's termination. (Emp. Br. At p. 7). While the inference of causation may be dispelled by a lengthy hiatus between an employee's protected activity and an adverse personnel action, the case law indicates that a two month period will not suffice. See, Mandreger, supra; Crosier v. Portland General Electric Co., 91 ERA 2 (1994). To the contrary, in Samodurov v. General Physics Corp., 89 ERA 20, (See. 1993) a period of two months specifically raised the inference of a causal link between protected activity and the adverse action.

---

[Page 22]

Moreover, the evidence supporting LaTorre's case is not merely circumstantial. The record provides a fairly direct connection between LaTorre's protected activity and his termination. As previously discussed, on Monday, September 16, 1996, one working day after the exposure incident, Dr. Bender wrote a letter to his supervisor, Dr. Molivar, disclosing and discussing the incident. Dr. Bender's letter directly connects LaTorre's radiation exposure concern with Dr. Bender's complaint about the "two incidents" which he cited as demonstrating LaTorre's confrontational attitude and resistance to supervision. The "two incidents" Dr. Bender mentioned were a direct outgrowth of LaTorre's complaint about Dr. Bender's handling of the phosphorous-32. (DX 1). (See, Emp. Br. at p.5).

Now I do not doubt that Dr. Bender had problems in his dealings with LaTorre apart from LaTorre's protected activity. Nevertheless, the legal standard applicable here requires consideration of all factors contributing to the adverse action, and in that context, it must be noted that Dr. Bender himself linked his

managerial complaint, at least in part, to LaTorre's protected activity. It is indisputable on this record that concerns expressed by LaTorre regarding the radiation exposure incident prompted Dr. Bender's September 16th letter to Molivar complaining about LaTorre. As such, more than mere inferences of a retaliatory motive are raised under circumstances in which a supervisor's personnel complaints are so directly linked to the protected activity.

Dr. Bender's letter, in turn, prompted Mintzer to convene a meeting with Drs. Bender and Molivar on September 17th to address Dr. Bender's problems with LaTorre. The same letter coupled with a rumor Mintzer had heard that the NRC was going to visit Coriell, impelled Mintzer to convene the September 18th meeting attended by LaTorre, Mintzer and Dr. Bender. During this meeting, Mintzer incorrectly accused LaTorre of failing properly to disclose the radiation exposure incident to Coriell's Human Resources Office, a charge he subsequently included in Coriell's termination letter.

Mintzer then convened a third meeting during the week of September 20, 1996, (hereinafter, the September 20th meeting) with LaTorre and Drs. Bender and Molivar. During this meeting, LaTorre's complaint to the NRC and the NRC's site visit on September 18th, were discussed along with Dr. Bender's letter of September 16th outlining the managerial problems he was experiencing in supervising LaTorre. At a time when Dr. Bender was not in the room, but Mintzer was present, Dr. Molivar commented to LaTorre that Dr. Bender was wrong in removing the shield, but LaTorre was "more wrong" for calling the NRC. Upon Dr. Bender's return, Dr. Molivar rejected his suggestion that LaTorre be transferred to another supervisor, and before the meeting adjourned, LaTorre was given and requested to sign "Performance Expectations." Among other instructions these "Expectations" required LaTorre to obtain approval for personal leave time, and to meet every morning with Dr. Bender.[2]

---



As this record demonstrates, Dr. Bender's letter and each meeting thereafter convened by Mintzer inextricably intertwined LaTorre's protected activity with supervisory complaints about LaTorre and the personnel actions imposed to correct those complaints. Indeed, Dr. Molivar's refusal to allow LaTorre to transfer to another supervisor,[3] and his comment to LaTorre, when Dr. Bender left the September 20th meeting, that LaTorre was "wrong" to contact the NRC, constitutes direct evidence of a retaliatory motive by management contributing, at least in part, to the personnel actions taken against LaTorre, including his termination.

There is, moreover, additional circumstantial evidence in the record that LaTorre's protected activity was a factor which contributed to his dismissal. Mintzer testified that he reviewed LaTorre's personnel file and discounted two

excellent performance reviews in 1995 and 1996, because LaTorre enjoyed a close working relationship with his former supervisor, Dr. Kim. Mintzer testified that Dr. Kim, according to Dr. Molivar, "overstated" LaTorre's performance in a 1994 evaluation, and Mintzer therefore concluded that Dr. Kim's evaluation of LaTorre were thereafter tainted.

LaTorre's 1995 and 1996 performance evaluations, however, were reviewed by Dr. Molivar who independently concurred in Dr. Kim's evaluations. Prior to LaTorre's safety complaints, Dr. Molivar apparently thought rather highly of LaTorre as an employee and added his personal favorable comments to LaTorre's 1995 and 1996 evaluations. While Mintzer explained his rationale for rejecting Dr. Kim's assessment of LaTorre's work, he discounted, without explanation, the positive evaluations of LaTorre authored by Coriell's then-Director, Dr. Molivar.

In addition, Coriell personnel policies regarding disciplinary actions provide that management should be patient, sympathetic, fair, and tolerant in administering discipline. The policy calls upon the official administering the discipline, Mintzer and Dr. Bender in this instance, to investigate all facts before charging an offense, to permit the employee to see the charges, and to afford the employee an opportunity to respond.

Yet, Mintzer neither asked Dr. Bender for the substantiation supporting his recommendation to dismiss LaTorre, nor did he afford LaTorre an opportunity to respond to the charges. In view of Dr. Molivar's evaluation of LaTorre as a diligent, industrious employee, and considering Coriell's policy of seeking facts before imposing discipline, Mintzer's decision to ignore the evaluations and eschew any investigation of the facts allegedly supporting the charges, treated LaTorre in an uncommonly abrupt and prejudicial manner. When departures from customary personnel policies adversely impact a protected employee, an inference is raised that protected activity contributed to the disparate treatment.

Upon review of the record considered as a whole, I conclude that LaTorre has adduced evidence, both direct and circumstantial, sufficient to satisfy his burden under

---



Section 5851(b)(3)(C), of demonstrating that retaliation for his protected activity was a "contributing factor" in the adverse personnel actions subsequent to September 13, 1996, including the decision to fire him implemented by Mintzer on November 21, 1996.

## II.
## The Employer's Response

Prior to the 1992 Amendments to the Act, the Secretary of Labor set forth a guideline for the consideration of evidence presented by the employer in defense of a prima facie showing of discrimination by an employee. Pursuant to Dartey v. Zack Company of Chicago, 82 ERA 2 (April 25, 1983), the employer had the burden of producing evidence that the alleged unlawful adverse action was actually motivated by legitimate, nondiscriminatory reasons. See also, Hedden v. Cornam Inspection, 82 ERA 3 (Decision of the Secretary, June 30, 1982). If the reasons advanced were not pretexts, the trier of fact considered whether the employer was motivated by both prohibited and legitimate reasons for initiating the adverse action. Under circumstances in which dual motives were found, the employer had the burden of proof to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Dartey, supra at 7-9. The Dartey decision thus adopted the rule previously applied in an ERA case before the Second Circuit Court of Appeals in Consolidated Edison v. Donovan, 673 F.2d 61, (2nd Cir., 1982), and was subsequently adopted in Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, (9th Cir. 1984).

The 1992 Amendments changed this adjudicatory format to the extent that issues relating to pretextual reasons and dual motives for the adverse action were subsumed by Section 5851(b)(3)(D). The Employer now has the burden of showing by "clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of protected behavior. (See, Stone and Webster, supra).

Alleged Reasons for Terminating
The Employee

As previously noted Coriell initially proffered four reasons for discharging LaTorre. The termination letter charged LaTorre with (1) failure to consistently follow his schedule by working less than eight hours a day,(2) failure to meet with Dr. Bender every day at 9:00 a.m., (3) failure (a) to report the September 13, 1996 exposure incident to Coriell's Human Resources Office in accordance with Coriell policy and (b) to request to be seen by the doctor at Coriell's Occupational and Health Office, and (4) failure to meet the objectives of his position.

---

[Page 25]

Before addressing these reasons in detail, it is necessary to comment upon additional arguments raised by Coriell.

Insubordination

In its post-hearing brief, Coriell argues that it had additional, legitimate, non-discriminatory justifications for LaTorre's termination. It contends that LaTorre's

actions show an "obstinate mind set," and his failure to meet with Dr. Bender each morning was conduct that "could not be tolerated by any employer." Citing Kahn v. Secretary of Labor, 64 F.3d 271, 279(7th Cir., 1995) the Employer asserts that protected activity does not shield an insubordinate employee from termination. As such, Coriell emphasizes that in New Jersey it can fire an "at-will" employee like LaTorre for "good reason, bad reason, or no reason at all...." and cites, Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 397 (1994). To the Witkowski rationale, the Secretary has added a caveat when the provisions of the ERA are invoked. The Secretary has acknowledged the Employer's right to terminate at-will employees for good reason, bad reason, or no reason, "so long as it's not a discriminatory reason." Collins v. Florida Power Co., 9 ERA 47 (5/15/95).

Beyond that, Coriell's brief emphasizes LaTorre's confrontational attitude and "insubordination" as reasons for his dismissal. Yet, the evidence does not support these contentions. The record shows that LaTorre was instructed by Molivar to "indoctrinate" his new supervisor in Coriell policies and procedures, and it is not clear from this record that anyone told Dr. Bender that his subordinate had been assigned the job of educating him in that way. LaTorre was asked to bring his new supervisor up to speed, and Dr. Bender's perception that LaTorre was challenging him may have, in part, been attributable to the role LaTorre was asked to perform. Although LaTorre could have perhaps been more tactful in executing this task, and may have crossed the line between informing Dr. Bender and criticizing him, the role LaTorre was asked to assume may have, in a general sense, contributed to Dr. Bender's impressions. After Dr. Bender, in his September 16 letter, questioned what he perceived as LaTorre's general resistence to his authority, Dr. Bender testified that he had no further problems with LaTorre's "confrontational" attitude. Carter v. Electrical District No. 2 of Pinal County, 92 TSC 11, (Sec. 7/26/95).

Now, with respect to the particular September 13th exposure incident, LaTorre's protected activity inherently involved a direct confrontation with his supervisor, since it was the supervisor's actions in LaTorre's presence which gave rise to the safety concerns LaTorre expressed. Thus, the specific instances of "confrontation" cited by Dr. Bender in his September 16 letter, emanate from LaTorre's protected activity, and there is no evidence that LaTorre's verbal expressions of concern were indefensible or in any way insubordinate. Carter, supra. As such, even if the working relationship between LaTorre and Dr. Bender was, from the start, volatile or difficult, due in part to Dr.

---



Molivar's instruction, and, in part, to a deficiency of interpersonal skills, Coriell still incurs the risk if legal and illegal motives behind the employee's termination merge and become inseparable. Passaic v. Valley Sewage Commissioners v. Department of Labor, 992 F.2d 474, 476, 482, (3rd Cir., 1993).

Finally, I would note that the termination letter cites the failure to meet each day at 9:00 a.m. with Dr. Bender as a failure by LaTorre to maintain his work schedule and to meet the objectives of his position. It did not charge LaTorre with insubordination. Consequently, Coriell's argument that LaTorre was fired for insubordination in his conduct toward Dr. Bender is not supported by the termination letter or by Coriell's policies on discipline. If the Employer had intended to charge LaTorre with insubordination, its policies indicate it should not only have given LaTorre an opportunity to see, hear, and respond, to the allegations, but it would have actually charged him with the offense. For all of the foregoing reasons, I conclude that insubordination was not a ground Coriell relied upon in support of its action, but that even if it were, the evidence would not support it.

Other Reasons

While the alleged justifications included by Coriell in its termination letter would seem, on the surface, to provide adequate reasons for the adverse action here taken, upon closer review, it is apparent that Coriell has failed to establish by clear and convincing evidence that, in this instance, LaTorre would have been dismissed for any or all of the alleged reasons in the absence of his protected activity.

Termination Letter
1.
Workhour Abuses

Coriell asserts that LaTorre worked fewer than eight hours per day. The record shows that he was a salaried employee who was expected to work six and three quarters hours, not eight hours per day. He was not required to punch a time clock or to sign in upon arriving at work in the morning or sign out in the evening.

Dr. Bender testified that ordinarily he does not keep close track of hours and does not object when employees take an extra 15 minutes from time to time. He monitors employees only when they are missing "a lot" and suspects they are abusing a privilege.

Prior to September, 1996, LaTorre worked at Coriell for eight years, and no evidence was presented that he had ever been questioned about his work hours. Indeed, no one, including Dr. Bender, at anytime prior to the protected activity on September 13, ever criticized LaTorre's attendance or saw a need to monitor him. Yet within a week of his protected

activity, and running through November 21, 1996, Dr. Bender kept an anecdotal record of his attendance. When the monitoring period ended, Dr. Bender recommended LaTorre's dismissal for work-hour abuses although he never questioned or admonished LaTorre about his work hours. Aside from the retaliatory overtones suggested by this surveillance, the charge is otherwise lacking in merit.

LaTorre is charged with consistently working fewer than the required number of work hours. His hours, however, were not formally recorded. Anecdotally, Dr. Bender noted what he believed were unexcused absences, but he acknowledged that he did not always work with LaTorre, and was not always available to meet with him at 9:00 a.m.. The record shows that LaTorre worked in seven different laboratories on three different floors, and Dr. Bender was not necessarily aware of LaTorre's work station at any given time. Dr. Bender, therefore, would not always know LaTorre's arrival time, lunch hour, or departure time each day. Under these circumstances, Dr. Bender's attendance record lacks sufficient reliability to conclude that LaTorre actually accrued any unexcused absences.

Beyond that, considering Coriell's liberal leave practices, Dr. Bender's record fails to show any "consistent" failure by LaTorre to work required hours. Even if accepted as completely accurate, Dr. Bender's record shows that LaTorre missed 45 minutes on October 10, 1996, 45 minutes on October 16, and 1 hour on November 7, totaling 2 1/2 hours over three days in a two month period. In an organization which admittedly does not endeavor to keep close track of the work hours of its salaried employees, and grants relatively liberal unexecused absences of short duration, the unexcused time LaTorre may have taken does not appear abusive.

This is not to suggest that an employer is precluded from insisting upon strict compliance with its required workhours, and Coriell presumably sought to hold LaTorre to a strict standard when it had him sign the "Performance Expectations." Rigid attendance enforcement, however, becomes suspicious when it is singularly targeted against an ERA protected employee. Under circumstances in which it is demonstrated that the employer has considerable discretion in determining how unexcused absence will be factored into a personnel decision, a bit closer scrutiny is warranted to ensure that its discretion is not applied in an improperly discriminatory manner. See, Vanadore v. Oak Ridge National Laboratories, 92 CAA 2, 93 CAA 1 (6/7/93).

The record shows that supervisors at Coriell had considerable discretion in dealing with unexcused absences, and it contains no proof that supervisors routinely monitored or pursued disciplinary action against employees with 2 1/2 hours of unexcused absences over a 2-month period. The action against LaTorre, therefore, appears uncharacteristically harsh and discriminatory especially considering the evidence which includes no blemish on LaTorre's attendance

record before his protected activity and the subsequent informal attendance surveillance by his supervisor following his protected activity.

---

[Page 28]

Further, if the absence of attendance problems with LaTorre before September 13, 1996, is a revealing consideration, Mintzer's testimony is equally illuminating. Before dismissing LaTorre, Mintzer had never fired a Coriell employee for work hour problems. Yet, Dr. Bender never questioned LaTorre about his attendance, and Mintzer never investigated the factual basis for Dr. Bender's charge. An inference of retaliation is raised when management authority is vigorously exercised, based on questionable documentation, against an employee with no prior record of attendance abuse, who two months before had engaged in protected activity.

After Acquired Evidence

Sometime after LaTorre was fired, Mintzer apparently inquired about the factual support for the charge of work hour abuse. Perhaps in recognition of its patent weaknesses, Mintzer conducted an investigation of LaTorre's work hours using the building access security system. Seemingly, the system tracked LaTorre's times of arrival and departure.

In his post-hearing brief, LaTorre suggests that the information gathered during that investigation is not relevant, because it was acquired after his termination, and, therefore, could not constitute a legitimate reason for his dismissal. Although LaTorre's observations are not without merit, after acquired evidence of wrongdoing is relevant to questions of reinstatement and pay issues. See, McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, (1995). Thus, Mintzer testified that his investigation showed that LaTorre's unexcused absences were more frequent than recorded by Dr. Bender. He "estimated" that "on average", LaTorre worked 6 hours rather than 6 3/4 hours per day. Although the security system records which provide the documentation allegedly supporting this "estimated" average were not offered into evidence, Mintzer's testimony based on these records is otherwise problemmatic.

Coriell's security system requires an employee to move a coded card through a sensing mechanism to open the doors upon entering or exiting the laboratory building. Once the doors are open, however, any number of employees may enter or leave freely without separately entering their respective security cards. In the morning, during lunch, and in the evening, groups of employees may pass through the doors with no member of the group identified except the one employee who used a card to open the doors. Similarly, employees could enter and leave the laboratory building through the loading dock without triggering the security system.

Coriell's administrative offices are secured, although between the hours of 8:00 a.m. and 4:00 p.m. the doors may be opened freely without the need to swipe an identification card through a monitor. Consequently, if an employee arriving in the morning at 8:00 a.m. started his work day in the administrative offices, and did not enter the laboratory until 9:00 a.m., the security system would not record the first hour worked. Similarly, if an employee

---



left the laboratory building at 3:00 p.m. but worked until 4:00 p.m. in the administrative building, the security system would not record his last hour of work. The record further shows that LaTorre had legitimate reasons to work in the administrative building during regular business hours.

Considering its limitations, the building access security system is inherently unreliable as device to monitor employee work hours unless Coriell required each employee to trigger the system individually each time the employee entered and left the laboratory and administrative offices. No such requirement was imposed, however, and as programmed by Coriell and used by its employees, the security system, therefore, could not surreptiously monitor an employee's hours fairly. On this record, Mintzer's estimate of LaTorre's hours based upon his after-the-fact investigation of security system records is fatally flawed.

For all of the foregoing reasons, Coriell has failed to show by clear and convincing evidence that LaTorre had any unexcused absences, consistently worked fewer than his required number of hours, or that its action against him was not a reprisal for his safety complaint.

2.
Daily Meetings

On September 20, 1996, Coriell issued Performance Expectations requiring LaTorre to report to Dr. Bender for a meeting every workday at 9:00 a.m. Dr. Bender kept a book in which he maintained anecdotal records of his recollections, not a daily log, of LaTorre's failure to report to these meetings. Between September 21 and November 1, 1996, the book records no failure by LaTorre to report as instructed. On Thursday, November 7, Dr. Bender noted that LaTorre did not "checked-in" with him that week, and he reminded LaTorre to do so. On November 19 and 20, 1996, Dr. Bender noted LaTorre's failure to check-in at 9:00 a.m. The next day LaTorre was fired. The termination letter charged LaTorre with failing to meet every day at 9:00 a.m. Between September 21 and November 21, 1996, there may have been as many as six days when LaTorre did not meet with Dr. Bender at 9:00 a.m.

LaTorre acknowledges that there were days when he did not meet with Dr. Bender at 9:00 a.m., but he testified that he attempted to meet with Dr. Bender daily. He claims, however, there were times when Dr. Bender was not in his office at 9:00 a.m., and he would meet with him later in the day or the next day if Dr. Bender was available. Dr. Bender confirmed that, although he was usually in his office between 8:15 and 9:00 a.m., there may have been mornings when he was not available at 9:00 a.m. The anecdotal record fails to show those days, however, and Dr. Bender does not dispute LaTorre's testimony that he may have met with him later on days when the 9:00 a.m. meeting did not convene.

---

[Page 30]

The record shows that Dr. Bender never asked LaTorre why he missed a meeting at 9:00 a.m., and before he fired LaTorre, Mintzer never spoke with either LaTorre or Dr. Bender about the number of meetings LaTorre missed, the reason why he missed them, or whether the meetings were held on same days after 9:00 a.m. Although there is evidence LaTorre missed several 9:00 a.m. meetings, I conclude, in the context of his record, that clear and convincing evidence has not been adduced that LaTorre would have been fired absent his protected activity.

Now had it been established that Coriell was an organization which imposed a military style of discipline, the failure to meet every day at precisely 9:00 a.m. might provide legitimate grounds for dismissal. (Yule v. Burns International Security Services, 93 ERA 12 (5/24/95)).

In keeping with its academically-oriented, business research environment, however, Coriell's personnel policies reflect a more lenient, flexible, and discretionary approach to discipline than might be expected at a security firm or a military installation. Moreover, even where discipline is quite strict, it would seem unusual for a superior not to inquire about the reasons for an employee's absence. Thus, the disinterest exhibited by Dr. Bender and Mintzer in any explanation LaTorre had in this regard might be questionable even in a highly structured organization with strict discipline. Indeed, in work environments more restrictive than Coriell's, it is unlikely a subordinate would be fired for failing to attend 9:00 a.m. meetings under circumstances in which it was the superior who was unavailable for the meeting.

Thus, the book maintained by Dr. Bender fails to show his own availability at 9:00 a.m. on the days LaTorre is charged with missing the meetings. Nor does the evidence adduced by Coriell show that LaTorre's excuses, including his contention that meetings not held at precisely 9:00 a.m. occurred later in the day, are inaccurate.

An employer who does not seek the reason for an employee's failure to follow instructions or policy seemingly does not care to learn the answer. Yet, Coriell's personnel policies demonstrate that it ordinarily would welcome an opportunity to consider an employee's explanation for any questionable conduct, and, in this context, LaTorre's treatment seems discriminatory. In his case, the policy was fire first, ask questions later.

Under all of these circumstances, Coriell has failed to adduce clear and convincing evidence that LaTorre was at fault for 9:00 a.m. meetings which were missed or that, absent his protected activity, he would have been fired for missing 9:00 a.m. meetings which were later convened.

---

[Page 31]

3.
Failure to Report the Exposure Incident

Coriell discharged LaTorre for (a) failing to report the September 13, 1996, radiation exposure incident to Coriell's Human Resources Office and (b) failing to request a visit with a physician at Coriell's Occupational and Health Office. LaTorre acknowledges that he failed both to report the incident to the Human Resources Office and to visit the Occupational and Health Office. Absent extenuating circumstances, Coriell would be justified in dismissing a laboratory technician who disregarded its safety procedures.

Mintzer testified that Coriell's Exposure Policy requires the employee to notify his supervisor of an exposure incident, (See, also, DX 3, Sec. IX, p. 11), and this record confirms by clear and convincing evidence that LaTorre did, in fact, comply with that policy when he complained to Dr. Bender that he believed Dr. Bender was exposing him to radioactive material. Thereafter, it was managements obligation to refer LaTorre to the Human Resources Office, and, in turn, the obligation of the Human Resources Office to refer LaTorre to the Occupational and Health Office. This record, however, shows that neither Dr. Bender nor Mintzer referred LaTorre to the Human Resources office, and, while Mintzer suggested that LaTorre visit the Occupational and Health Office if he intended to file a worker's compensation claim, LaTorre was never specifically referred to the Occupational and Health Office.

Since LaTorre complied with Coriell's radiation exposure reporting policies, it would be difficult not to conclude that this alleged justification is a fairly transparent pretext for the dismissal.

4.
Failure to Meet Work Objectives

Coriell argues that it would have terminated LaTorre in the absence of his protected activity, because he failed to meet the work objectives of his position. Coriell would, absent extenuating circumstances, be justified in terminating a laboratory assistant who failed to perform his job. Having carefully considered the evidence relating to this charge, however, I have concluded it is not worthy of credit.

While an employee's past excellence is no guarantee that his work effort will not falter, LaTorre's prior performance evaluations provide a prospective which cannot be ignored. Even discounting Dr. Kim's observations, the evaluations of LaTorre provided by Dr. Molivar, the Institute's Director, are telling and credible. In 1995, Dr. Molivar expressed his satisfaction with the quality and quantity of LaTorre's work. In January of 1996, Dr. Molivar again evaluated LaTorre as an industrious, loyal, diligent worker. There is additional uncontradicted evidence that Mintzer in July of 1996, on the occasion of Dr. Kim's departure, expressed his satisfaction with LaTorre's work. Yet four months later, Mintzer on the recommendation of Dr. Bender, fired LaTorre for not meeting his work objectives.

---

[Page 32]

While Mintzer did not ask Dr. Bender about the specifics of this charge, Dr. Bender testified that LaTorre performed the work assigned to him and was "competent enough", but Dr. Bender was dissatisfied with LaTorre's efficiency and the amount of work he performed. Yet, the allegation of "slow" work or "inefficiency" remains vague and devoid of a single specific supporting example. Under similar circumstances, the court's have been extremely wary of such subjective criticisms when leveled at an employee who has recently engaged in protected activity. (See, Passaic Valley, supra at 481; Bechtel, supra, at 934-35).

Coriell's case is, in fact, weaker than the case presented by the employer in Bechtel. The Bechtel court was, at least, presented with specific examples which it rejected as "insignificant" instances of alleged "slow work." The employer here provides no examples at all. We can determine only Dr. Bender's general disappointment in the amount of work LaTorre performed.

Yet, Dr. Bender was free to assign as much work to LaTorre as he deemed appropriate. He was also free to impose deadlines. No evidence was offered, however, that LaTorre ever refused an assignment or missed a deadline set by Dr. Bender. No instance of a work backlog, a delayed experiment, or an incomplete task, is attributed to LaTorre. With the exception of the requirement, which I have previously addressed, that LaTorre meet daily at 9:00 a.m. with Dr. Bender, Coriell has not identified a specific work objective, assignment, or task that LaTorre failed timely to accomplish. When an otherwise protected employee's dismissal is vaguely grounded upon "slow work" or "inefficiency," an evidentiary

void of the magnitude here presented consumes the employer's allegation. The evidence adduced by Coriell is insufficient to demonstrate, clearly and convincingly, that, absent LaTorre's protected activity, it would have fired him for failing to meet the objectives of his job.

Grounds for Termination Considered in Combination

Coriell emphasizes that it did not fire LaTorre for any single reason, but rather it was the totality of his abuses which compelled its decisions. The evidence, however, does not support that contention.

Considered alone, each of Coriell's reasons, if not an outright pretext, is largely unsupported by clear and convincing evidence. A slew of unsupported, pretextual, and insignificant reasons when added and considered together as the employer urges, really does not advance the employer's cause. The more ill-considered reasons a party enumerates in support of an adverse action, the more retaliatory the action appears. Evaluated alone and in combination, the reasons Coriell advances for firing LaTorre are not sustainable on this record. Coriell has, therefore, failed to establish by clear and convincing evidence that it would have fired LaTorre even if he had not engaged in protected activities.

---

[Page 33]

Complainant has established that his protected activity was a cause contributing to his termination, and the Employer has failed to demonstrate by clear and convincing evidence that it would have fired him in the absence of his protected activity. A violation of the ERA has been established, and relief is warranted.

Relief

Complainant requests immediate reinstatement to his former position with Coriell; back pay from date of termination until reinstatement, compensatory damages in the amount of $26,500, and litigation costs and attorney's fees totalling approximately $3,500.

Once prohibited discrimination is found in violation of the Act, Section 5851 requires reinstatement of the Complainant with compensation including back pay and restoration of the terms and conditions of his employment. Blackburn v. Metric Constructors, Inc., (86 ERA 4 (Sec. 10/30/91). Deford v. Secretary of Labor, 700 F.2d 281 (6th Cir., 1983).

The record shows that LaTorre has diligently, but unsuccessfully, sought employment through local newspaper ads, job search agencies, and family members, and has participated in several job interviews. He has, therefore, attempted to mitigate the impact of the adverse action. Doyle v. Hydro Nuclear

Services, 89 ERA 22 (ARB, 9/6/96); West v. Systems Applications International, 95 CAA 15 (Sec., 4/1/95). An order requiring reinstatement with full back pay will, therefore, be entered, (Blackburn v. Metric Constructors, Inc., 86 ERA 4 (Sec. 10/30/91) without deduction or offset for the unemployment compensation LaTorre may have received. (Artrip v. Ebasco Services, Inc., 89 ERA 23 (ARB, 9/27/96). Interest on the backpay shall be calculated in accordance with the appropriate regulations. (See, Blackburn, supra; Palmer v. Western Truck Manpower, Inc., 85 STA 16 (Sec., 1/26/90).

Compensatory Damages

Complainant also seeks compensatory damages for mental anguish and emotional distress, and it is well settled that such damages are available under the Act and the regulations. 42 U.S.C. §5851(b)(2)(A); 29 CFR §24.6(b)(2); DeFord v. Secretary of Labor, supra.

Complainant testified, without contradiction in this proceeding, that he has experienced depression, anxiety, and loss of self-esteem as a consequence of losing his job. He has suffered the financial strain of lost income, and the embarrassment of explaining to potential employers why he was fired from his previous job. He has, since his unemployment compensation expired, drawn on his retirement savings to pay his mortgage, living expenses, and attorney's fees. Accordingly, LaTorre seeks the equivalent of his annual salary or $26,500 in compensatory damages.

---

[Page 34]

Applicable precedents establish that compensatory damages may be awarded, upon the credible testimony of the Complainant, for psychological injury, mental pain and anguish, and humiliation caused by an unlawful adverse personal action. Medical, psychiatric, or expert psychological analysis is unnecessary. Busch v. Burke, 649 F.2d 509, 519 (7th Cir., 1981) cert. denied, 454 U.S. 817 (1981); DeFord, supra; Doyle v. Hydro Nuclear Services, supra; Mosbaugh v. Georgia Power Co., 91 ERA 1 (Sec. 11/20/95); Thomas v. Arizona Public Services Co., 89 ERA 19 (Sec. 9/17/93). Indeed, a complaintant's credible testimony establishing his loss of self esteem, alone, without any concomitment financial hardship is sufficient to support a compensatory damage award. Blackburn v. Reich, 982 F.2d 125 (4th Cir., 1992). LaTorre has not only testified credibily about his loss of self esteem, but his emotional pain and suffering, (DeFord, supra; Blackburn v. Metric Constructors, supra) embarassment, (Creekmore v. ABD Power Systems Energy Co., 93 ERA 24 (Sec. 2/14/96), Lederhaus v. Donald Paschen, 91 ERA 13 (Sec. 10/26/92); and financial hardship. (Lederhaus, supra; Creekmore, supra; Blackburn, supra; DeFord, supra at 81 ERA 1 (Sec. 8/16/84).

While awards of less have been entered, in seeking $26,500 in compensatory damages, LaTorre is well within a reasonable range of damages awarded in similar situations. For example, in Marcus v. EPA, 92 TSC 5 (ALJ D & O, 12/3/92) an award of $50,000 compensatory damages, in addition to backwages and other relief, was entered upon evidence of "mental and physical anguish" suffered by the complainant in that case. A review of the Marcus decision demonstrates that the anguish adduced in that record was predicated solely upon the complainant's testimony. No medically determined permanent affect was demonstrated. On appeal, the award of compensatory damage was specifically affirmed by the Secretary. Marcus v. EPA, (Decision of Secretary, 2/7/94 at pg. 10). In Gaballa v. The Atlantic Group, Inc., 94 ERA 9 (Sec., 1/18/96), a compensatory damage award of $35,000 was entered for the mental suffering and emotional stress, pain, and anguish caused by an adverse action taken in violation of the Act. In Creekmore, supra, an award of $40,000 was entered by the Secretary, and recently an award of $100,000 was entered in Smith v. Esicorp, Inc., 93 ERA 16 (ALJ, 2/26/97). Considering the circumstances adduced in this record, I find and conclude that the evidence here justifies an award of $26,500 in compensatory damages.

## Attorney's Fees

Complainant further seeks reimbursement in the amount of $3,500.00 in attorney's fees. Costs of this type are recoverable by successful complainants in an ERA

---



proceeding. DeFord, supra, at 288-89. The Secretary may determine, however, whether such costs are "reasonably incurred," and has, pursuant to this responsibility, required counsel to document costs and fees. DeFord v. TVA, 81 ERA 1, (Decisions of the Secretary June 30, 1982 and April 30, 1984). Since no documentation of fees or costs has been submitted in this matter, an assessment of reasonableness cannot be made. It will, therefore, be recommended that the request for fees and costs be denied without prejudice.

Counsel will be afforded an opportunity to submit an application for fees, together with supporting data, including among other things, her professional qualifications, an itemization of the hours expended on complainant's behalf in this case, and her hourly billing rate. DeFord, supra, (Decision of the Secretary, June 30, 1982). Accordingly:

## ORDER

IT IS ORDERED that Coriell Institute for Medical Research:

1. Forthwith reinstate Gregory LaTorre to his former position as a Research Technician III with full back pay, with interest and benefits commencing November 22, 1996 to date and continuing until he is reinstated;

2. Pay to Gregory LaTorre the sum of $26,500 in compensatory damages.

3. Expunge from Gregory LaTorre's employment records all references to his engaging in protected activity, and any related claims against him arising out of or in connection with his protected activity;

4. IT IS FURTHER ORDERED that Complainant's request for attorney's fees totalling $3,500.00 be, and it hereby is, DENIED without prejudice.

STUART A. LEVIN
Administrative Law Judge

SAL:jeh

**[ENDNOTES]**

[1]Citations to the record shall be designated as follows: "Tr." - transcript of the hearing; "PX" - Complainant's Exhibits; "DX" - Respondent's Exhibits.

[2]There was no suggestion in this record that LaTorre ever had a problem with unexcused absences. LaTorre did not, however, specifically charge as a separate violation that these Performance Expectations were a form of harassment or a retaliatory adverse personnel action.

[3]Again LaTorre does not specifically argue that the refusal to transfer was an adverse action within the context of his complaint.